Co-operative Central Bank Ltd v Y & W Development Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-806 OF 1995
GOPAL SRI RAM, ABDUL MALEK AHMAD AND AHMAD FAIRUZ JJCA
1 JULY 1997

Land Law *— Charge — Validity of — Third party charge created after disbursement of loan amount — Whether registered charge was a contract — Whether charge unsupported by consideration — Whether consideration relevant in relation to validity of charge*

The appellant was the registered chargee of a piece of land. The respondent was the chargor which had created a third party charge in favour of the appellant. Upon the default of the borrower, the appellant sought to enforce the charge and applied for an order for sale of the land. The judge rejected the application on the principal ground that the charge was unsupported by consideration because the loan amount had been disbursed well before the creation of the charge. The appellant appealed.

Held, allowing the appeal:

A registered charge was not a contract. It was a statutory instrument; a dealing; which the National Land Code 1965 ('the Code') authorized. Section 340 of the Code conferred indefeasible title to the person or body in whose name any charge was for the time being registered and such title should be defeasible only as provided under s 340(2). In the present case, the enforcement of the charge by the appellant was the assertion of a statutory right. It was not an action upon a covenant. As the charge was perfectly valid and the evidence disclosed no cause to the contrary, the appellant's application for an order for sale should have been granted and this appeal must be allowed (see p 376A–D); *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers* [1986] 1 MLJ 44 followed.

[Bahasa Malaysia summary

Perayu merupakan pemegang gadaian berdaftar sebidang tanah. Penentang adalah penggadai yang telah mewujudkan suatu gadaian pihak ketiga yang memihak kepada perayu. Atas keingkaran peminjam, perayu meminta supaya gadaian dikuatkuasakan dan memohon satu perintah jualan atas tanah tersebut. Hakim menolak permohonan atas alasan utama bahawa gadaian tidak disokong oleh balasan kerana amaun pinjaman telah dibayar jauh sebelum kewujudan gadaian. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan:

Sesuatu gadaian berdaftar bukanlah satu kontrak. Ia merupakan instrumen statutori; suatu urusniaga; yang dibenarkan oleh Kanun Tanah Negara 1965 ('Kanun tersebut'). Seksyen 340 Kanun tersebut

mengurniakan hakmilik tak boleh disangkal kepada orang atau badan atas namanya mana-mana gadaian adalah pada masa itu terdaftar dan hakmilik demikian haruslah boleh disangkal seperti yang diperuntukkan di bawah s 340(2). Dalam kes ini, penguatkuasaan gadaian oleh perayu adalah kenyataan suatu hak statutori. Ia tidak merupakan tindakan atas waad. Oleh kerana gadaian adalah sah dan keterangan tidak mendedahkan sebarang sebab bertentangan, permohonan perayu untuk perintah jualan sepatutnya diberikan dan rayuan ini mestilah dibenarkan (lihat ms 376A–D); *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers* [1986] 1 MLJ 44 diikut.]

Notes

For cases on validity of charges, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1562–1564.

Cases referred to

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257 (refd)
NKM Properties Sdn Bhd v Rakyat First Merchant Bankers [1986] 1 MLJ 44 (folld)

Legislation referred to

National Land Code 1965 ss 256, 340

Appeal from: Originating Summons No S1–24–666–92 (High Court, Kuala Lumpur)

Murali Achan (*Vije & Co*) for the appellant.
K Jeyaraj (*Rajindar Singh Veriah & Co*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment): The appellant is the registered chargee of a piece of land. The respondent is the chargor. But it is not the borrower. It created what the profession calls a third party charge. The borrower was one Ismail bin Omar. He made default in repayment. The appellant then took advantage of the provisions of the National Land Code 1965 ('the Code') and commenced proceedings to obtain an order for sale of the land in question. But they did not succeed. That is because the judge who heard the application came to the conclusion that the respondent chargor had shown cause to the contrary within the meaning of that expression in s 256 of the Code.

The principal ground upon which the learned judge held in favour of the chargor is that the charge was unsupported by consideration. He found on the evidence that the loan amount was disbursed well before the creation of the charge. Applying principles governing relationships between creditor and surety, he held the consideration to be past. He thought that just like a guarantee is void where consideration is past, so too a charge.

A Before us counsel for the appellant, Mr Achan has argued that the learned judge is wrong for two reasons. First, it is submitted that the annexure to the charge in cl 1 provides sufficient consideration. That clause when paraphrased says that the respondent is to pay the appellant all sums owing as at the date of the charge. To emphasize the point made, the actual words used by the clause are:

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> The chargor will on demand pay to the Bank all monies which are now or shall from time to time or at any time hereafter be due and owing by the abovenamed Ismail bin Omar ...

The second reason advanced in support of the appeal is that the learned C judge was wrong in treating the contract in the annexure as equivalent to the registered charge. Counsel for the appellant argues that even if the judge was right in holding that the contract was void, the charge survives. In support of this submission counsel cites the decision of the Federal Court in *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers* [1986] 1 MLJ 44.

D Mr K Jeyaraj, counsel for the respondent, has argued that the learned judge was correct in his conclusion. He has submitted that a third party charge is just like a guarantee. It must be supported by consideration. Since the law regards past consideration as being incapable of supporting a promise, a charge created after the disbursement of the loan it secures is E void, just as a guarantee is void.

In my judgment counsel for the appellant is correct in his submissions. Whilst it is convenient to refer to a third party charge as being akin to a guarantee (indeed, I have done so myself) it is wrong to conclude that the principles of law that govern guarantees apply with equal force to such F charges. The correct position is that stated by Hashim Yeop Sani FJ (as he then was) in *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd.* In the simplicity of language characteristic of that eminent judge he said (at p 45):

> Section 340 of the National Land Code confers indefeasible title to the G person or body in whose name any charge is for the time being registered and such title shall be defeasible only as provided under sub-s (2) of that section. See also *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81.
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> It would seem to us that the appellants chose to rely not on the charge but on the annexure to the charge which, it is true, provides as to the H manner and conditions for the disbursement of the loan. In our view, however, cl 3.04 of the annexure merely imposes a duty on the bank to make the disbursement of the loan after the execution and presentation of the charge. But this does not prevent the respondent bank from making disbursement before the execution of the charge as done in this case with the understanding the money was urgently required for the purpose of I purchasing the same land. It is to be noted also that the rate of interest payable was the same. The conditions precedent for disbursement under Art V of the annexure to the charge would be relevant only where disbursement of the loan had not been prior to the execution of the charge.

Not only do I agree with what has been said by his Lordship on that occasion, but I also think it is common sense. A registered charge is not a contract. It is a statutory instrument; a dealing; which the Code authorizes. Enforcement of the charge is the assertion of a statutory right. It is not an action upon the covenant: see *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257.

In the present case, if the appellant had sued for breach of the terms in the annexure, that is to say, upon the covenant, then, it may have been successfully argued that the contract was unsupported by consideration. I use the word 'may' advisedly because I am in agreement with the appellant's counsel that the annexure itself was supported by consideration, which in my judgment is sufficient and not past.

I am accordingly unable to agree with the submission of Mr Jeyaraj in opposition to the appeal. In my judgment, the learned judge erred upon a fundamental point, which forms the fulcrum of the Code. The charge in this case is perfectly valid. The evidence discloses no cause to the contrary within the principles which the Federal Court laid down in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77.

For the reasons given, this appeal must be allowed. I would reverse the judgment of the learned judge and make an order in terms of prayers (1) and (2) of the appellant's originating summons. All other prayers are remitted to the judge for disposal. Since counsel on both sides are agreed to this court fixing the costs of this appeal, I would award costs of RM1,000 to the appellant. The deposit lodged in court shall be refunded to the appellant.

Abdul Malek Ahmad JCA: I agree with the reasons given by my brother Gopal Sri Ram JCA. I too would allow this appeal with costs of RM1,000 to the appellant.

Ahmad Fairuz JCA: I agree with the reasons given by my brother Gopal Sri Ram JCA, and with the orders he proposes to make in this appeal. In particular, I agree with his application of the decision in *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd* [1986] 1 MLJ 44 and his interpretation of cl 1 of the annexure to the charge in this case.

Appeal allowed.

Reported by Kevin Ooi